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No. 93-286

In The

Supreme Court of the United States

October Term, 1993

HARLAN D. DOUGLASS AND MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,

Petitioners,

versus

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The real issue presented is whether the Idaho non-judicial foreclosure sale statutes as interpreted by the Idaho Supreme Court violate the due process clause of the Fourteenth Amendment of the United States Constitution.

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BRIEF IN OPPOSITION

Respondent, FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION, respectfully prays that the Petition for Writ of Certiorari filed by Petitioners to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

BASIS FOR JURISDICTION

Petitioners appear to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioners (hereinafter "Douglass") executed a note and deed of trust on certain Idaho real property to secure an indebtedness to Respondent (hereinafter "Frontier Federal") in the amount of $1,300,000.00. Douglass defaulted on the note and also allowed the property to be foreclosed upon by a mechanics' lienholder. Thereafter, Frontier Federal proceeded to effect a non-judicial foreclosure of the deed of trust pursuant to the pertinent Idaho statutes, specifically Idaho Code § 45-1505, which requires a notice of default stating that the beneficiary elects to sell the property "to satisfy such obligation." Frontier Federal purchased the property at the trustee's sale for $869,000.00. Frontier Federal then moved, pursuant to Idaho Code § 45-1512, to seek a deficiency judgment under the deed of trust. After Frontier Federal's action for a deficiency judgment was filed, Douglass answered claiming certain deficiencies in the conduct of the trustee's sale.

Both parties moved for summary judgment and, after the parties stipulated as to the fair market value of the property, the district court entered judgment in favor of Frontier Federal in the amount of $241,811.46 plus attorney's fees and interest. Nowhere in the trial court proceedings did Douglass claim that the Idaho statutes which allowed a deficiency judgment after the trustee's

sale and which required notice of default stating that the property was to be sold to "satisfy such obligation" were unconstitutional as a deprivation of due process.

Douglass appealed the trial court's ruling to the Idaho Supreme Court. On appeal, in addition to the arguments concerning improper conduct of the non-judicial sale, Douglass also claimed that Frontier Federal was precluded by waiver or estoppel from recovering the statutory deficiency judgment allowed by Idaho Code § 45-1512. Again, nowhere in the pleadings did Douglass claim a denial of due process rights. The Idaho Supreme Court affirmed the district court's summary judgment against Douglass.

Douglass filed a Petition for Rehearing to the Idaho Supreme Court. It was only at that late date that the Petitioners advanced an argument regarding denial of due process. The Idaho Supreme Court summarily denied Douglass' petition. Douglass then brought this Petition for Writ of Certiorari.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE DUE PROCESS ARGUMENT WAS NOT RAISED BEFORE OR PASSED UPON BY THE COURTS BELOW.

Pursuant to Rule 14.1(h) of the Rules of the United States Supreme Court, a petition for a writ of certiorari must specify the stage in the proceedings at which the federal questions sought to be reviewed were raised and

the way in which they were passed upon by the courts below. Douglass' petition does not contain such a required statement because the due process issue was not raised by Douglass until his petition for rehearing to the Supreme Court of the State of Idaho. Neither the trial court nor the Idaho Supreme Court considered or passed upon the constitutional issue since it was not timely raised by Douglass.

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review final judgments of the highest court of a state "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . ." The judgment of the Supreme Court of the State of Idaho does not uphold the validity of the Idaho non-judicial foreclosure statutes against constitutional challenge because no constitutional challenge was timely raised by Douglass.

The requirement that the Court will not address an issue which has not been presented to or decided by the state court below was analyzed by this Court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, *reh'g denied*, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983). The Court held that whether the rule against deciding claims "not pressed nor passed upon" in the state court is based on jurisdictional considerations or prudential restrictions, it is inappropriate for the Court to decide questions not presented or decided in the courts below. 462 U.S. at 216-24. *See also Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). Those jurisdictional restrictions and/or prudential considerations apply in the present case, since the due process argument was not

timely raised by Douglass nor was it decided by the Idaho Supreme Court.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO GRANT THE PETITION.

Under Rule 10.1 of the Rules of the United States Supreme Court, a petition for writ of certiorari will be granted only "when there are special and important reasons therefor." It appears that Douglass is contending that the petition for writ of certiorari should be granted pursuant to Rule 10.1(c), which provides that one basis for the grant of a petition for writ of certiorari is when a state court has decided a federal question in a way that conflicts with applicable decisions of this Court. As discussed above, the Supreme Court of the State of Idaho was not presented with, and did not decide, any federal question. Its decision was based on an application of state law and an interpretation of state statutes.

Furthermore, the Idaho Supreme Court's decision interpreting Idaho statutes is consistent with this Court's interpretation of the due process clause of the United States Constitution.

The issue raised by Petitioner does not meet the criteria set forth in Rule 10 of this Court's Rules. Accordingly, Frontier Federal respectfully requests that the petition be denied. In the alternative, Frontier Federal requests the Court to issue a summary affirmance or a dismissal for want of a substantial federal question. Rule

16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

III

IDAHO CODE §§ 45-1505 AND 45-1512 ARE NOT UNCONSTITUTIONAL.

The Idaho non-judicial foreclosure statutes allow a lender to foreclose on a deed of trust and to pursue the borrower for a deficiency judgment if the sales price at the trustee's sale or the fair market value of the property as found by the district court is less than the amount owed. The Idaho statute requires that the trustee provide notice of default and notice of the pending sale to the borrower and that the notice provide that the lender elects to sell or cause to be sold "such property to satisfy such obligation." Idaho Code § 45-1505. Douglass contends that this language mandated by the Idaho statute serves to deny borrowers their constitutional right of due process because it does not give adequate notice to the borrower of the possibility of a deficiency judgment.

The Idaho statutory scheme provides for a two part non-judicial foreclosure on a deed of trust. If a borrower defaults on his obligations under the note and deed of trust, the trustee serves notice that the property will be sold at a trustee's sale. Idaho Code § 45-1505. There is no dispute that Douglass received notice of the pending trustee's sale.

Thereafter, Idaho Code § 45-1512 permits the lender to seek a deficiency judgment under the deed of trust if the trustee's sale does not bring in sufficient funds to cover the balance due under the promissory note. The

borrower is served with notice of this pending action and all hearings thereunder, and has the opportunity to be heard and present any defenses to the borrower's application for deficiency judgment. In addition, the borrower has the opportunity to present information to the court as to the fair market value of the property at the time of sale. After each party has the opportunity to be heard, the court may render a deficiency judgment, but may not render such judgment for more than the amount by which the indebtedness due at the time of sale exceeds the fair market value and the judgment may not exceed the difference between the amount for which the property was sold and the amount of the indebtedness. Thus, any deficiency judgment may be rendered only for the difference between the indebtedness and the greater of the fair market value or the sales price at the trustee's sale.

Due process requires that a person who is in jeopardy of loss of a property interest by state action be given notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Idaho Code § 45-1505 mandates that notice of the trustee's sale be provided to the defaulting debtors. Such notice was provided to Douglass in the instant case. A-82. That notice also contained, as required by Idaho Code § 45-1505, a statement of the balance owing for which the property was to be sold.

Idaho Code § 45-1512 explicitly provides that a creditor may seek a deficiency judgment after a trustee's sale. The statute in and of itself provides the notice required under the due process clause. But in addition, the statute requires that a court make the determination of the amount of the deficiency judgment after the debtor is

given notice and an opportunity to be heard regarding the validity of the debt, the fair market value of the property, and the proper amount of the deficiency.

Such statutory protections satisfy the requirements of due process as specified in this Court in *Fuentes v. Shevin*, 407 U.S. 67, 93 S.Ct. 177, 34 L.Ed.2d 165, *reh'g denied*, 409 U.S. 902, 93 S.Ct. 180, 34 L.Ed.2d 165 (1972), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The statutes provide for notice to the debtor and allow the debtor the opportunity to protect his property rights at the trustee's sale and to challenge the validity of the debt and the amount of the requested deficiency judgment at a hearing before a court.

The Idaho statutory scheme and the Idaho Supreme Court's interpretation of the statutes do not deprive Petitioner of due process under the Fourteenth Amendment to the Constitution.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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